OSMAN ABDUL GHANI & ANOR.

v.

UNITED ASIAN BANK BHD. & OTHER CASES

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH SCJ
HASHIM YEOP SANI SCJ
[CIVIL APPEALS NO. 96, NO. 106 & NO. 123 OF 1985]
28 MAY 1986

BANKING: *Guarantee - Whether valid consideration - Forbearance to sue - Express or implied - Circumstances of case.*

The respondent bank sued the 1st, 2nd, 3rd, 4th, 5th and 6th guarantors (hereinafter called the 1st, 2nd, 3rd, 4th, 5th and 6th appellants) in the High Court at Kuala Lumpur upon two written guarantees. The 1st guarantee is not relevant to this case. The 2nd guarantee of RM1,000,000 was executed by all the six appellants on different dates between 25 August 1977 and 22 September 1977. The respondent bank has elected to rely on its claim under the 2nd guarantee and the sole issues were whether there was valid consideration for that guarantee and especially, whether on the evidence, there was a request for forbearance in fact. The learned Judge inferred from the available evidence, that there was a request for forbearance and that there was forbearance in fact. The appellants hence appeal to the Supreme Court.

Held:

[1] (Per Hashim Yeop Sani SCJ & Lee Hun Hoe CJ Borneo)

(a) It was implicit in the communications between the relevant parties that forbearance was requested for. See *Crears v. Hunter* [1887] 19 QBD 341 and *Oriental Bank of Malaya Ltd. v. Subramaniam* [1958] MLJ 35.

(b) Where the real consideration is forbearance to sue this consideration more often than not has to be implied from the nature of the transaction as between businessmen. See *Miles v. New Zealand Alford Estate Co.* [1886] 32 Ch D 266 291.

(c) In the light of all the evidence available, there was a request for forbearance and there was forbearance in fact.

(d) For the above reasons, Their Lordships dismissed the appeal with costs.

[2] (Per George Seah SCJ dissenting)

(a) Where in a guarantee no stipulation for future advances is made, the consideration must be supplied by forbearance to sue for the existing debt at the request of the guarantor. The request may either be express or implied. See *Crears v. Hunter* (*supra*).

(b) Where no question arises to truthfulness and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of an appellate Court. See per Viscount Simonds in *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370 @ 372 and s. 69(4) of the Courts of Judicature Act 1964.

(c) The respondent had failed to adduce any evidence to establish that the appellants as directors ever requested directly or indirectly, for time and forbearance from the respondent.

(d) In relation to the 6th appellant, he was not a director when he signed the 2nd guarantee and there was no evidence, express or by necessary implication, where it could be implied that he requested the respondent to forbear from suing on the existing debt.

(e) No adverse inference should be drawn against the appellants for not giving evidence in the witness box because the onus of proving the case against all six appellants rested on the respondent.

(f) For the above reasons, His Lordship would have allowed the appeal.

[Appeal dismissed with costs.]

Cases referred to:
Yang Chin Lang v. Tan Chong & Sons Motor Co. Ltd. [1968] 2 MLJ 8
Lloyds v. Harper [1880] 16 Ch D 290
Creas v. Hunter [1887] 19 QBD 341
Oriental Bank of Malaya Ltd. v. Subramaniam [1958] MLJ 35
Fullerton & Anor. v. Provincial Bank of Ireland [1903] AC 309
Miles v. New Zealand Alford Estate Co. [1886] 32 Ch D 266
Wigan v. English & Scottish Law Life Assurance Association [1909] 1 Ch D 291
Glegg v. Bromley [1912] 3 KB 474
Alliance Bank v. Brown [1864] 62 ER 631
Heffield v. Meadows [1869] LR 4 CP 595
Montgomerie & Co. Ltd. v. Wallace-James [1904] AC 73
Beamax v. Austin Motor Co. Ltd. [1955] AC 370

Legislation referred to:
Courts of Judicature Act 1964, s. 69(4)

For the appellants (Appeal 96/85) - V.P. Pradhan; M/s. Skrine & Co.
For the appellant (Appeal 106/85) - Raja Aziz Addruse (S. Menon with him); M/s. Krishna, Menon & Lee
For the appellants (Appeal 123/85) - Atma Singh Veriah; M/s. Atma Singh Veriah & Co.
For the respondents (All 3 Appeals) - Robert Lazar; M/s. Shearn Delamore & Co.

JUDGMENT

Hashim Yeop Sani SCJ:

The respondent is a bank which operates a branch at No. 19, Jalan Melaka, Kuala Lumpur (hereinafter referred to as the "Bank") where a company known as Quality Tractors (M) Sendirian Berhad (hereinafter referred to as the "company") was a customer. At the date of trial all the appellants, save the 6th appellant, were directors of the company.

Sometime in May 1975 the company through the second appellant as the Managing Director applied to the Bank for overdraft facilities. Negotiations were held between the parties which resulted in the following banking facilities made available to the company:

Facilities	Limits
1. Foreign Documentary Letters of Credit	RM500,000
2. Shipping Guarantees & Trust Receipts	RM350,000
3. Cash Credit (Overdraft)	RM 80,000

4. Letters of Guarantee in favour of Government departments RM 25,000
5. Inland Cheques Purchased RM 25,000

Subsequently, the company executed a debenture dated 28 October 1975 in the sum of RM430,000. The 1st, 2nd and 6th appellants executed a guarantee in the sum of RM430,00 on 14 October 1975. This guarantee is known at the trial as the First Guarantee which however has no direct importance to this appeal.

About two years after the execution of the first guarantee and debenture the company executed a further debenture in the sum of RM1 million on 12 September 1977. All the appellants also executed a guarantee for the same amount on various dates between 25 August 1977 and 22 September 1977. This guarantee is known as the Second Guarantee which is the subject of this appeal.

The Bank has elected to rely on its claim under the Second Guarantee and the sole issue apparently was whether there was a valid consideration for that guarantee. However, looking at the arguments here and below the issue would seem to have been crystallised or narrowed down further to whether on the evidence there was a request for forbearance expressed or implied and whether there was forbearance in fact.

The first principle to apply in considering a written guarantee is as stated in *Yang Chin Lang v. Tan Chong & Sons Motor Co. Ltd.* [1968] 2 MLJ 8 following *Lloyds v. Harper* [1880] 16 Ch D 290 that a guarantee must be construed **reasonably** having regard to the surrounding circumstances.

It is not in dispute that the account of the company with the Bank had not been maintained satisfactorily. The amount outstanding as at February 1977 was RM969,994.46 and this exceeded the authorised limit by about RM40,000 (p. 105). The Bank could have sued the company then and at the same time could have foreclosed on the company under the first debenture. The remedy was certainly open to the Bank at that stage to do so. But events took a different course. There was an exchange of letters. George Daniel (PW1), the manager of the Bank at that time said at p. 26:

> When the bank's solicitor made a demand on the company, the company made a number of proposals. They said they were restructuring the company. Both the Directors and the Executive wanted forbearance from the Bank. In addition to that they suggested that they would like to go to another bank to get a better credit facilities. Hence, we did give them some time for them to negotiate and get approval about these facilities from the decision of the bank. They wanted to borrow from this new bank to pay us. We agreed to the proposals made.
>
> At the negotiation they proposed to open another account because the first Current Account was already overdrawn. They suggested that another account be opened called Account No.2.

On the opening of the second account PW1 said in evidence at p. 78:

> When **in response to request for an extension of time** after some negotiations I allow the company to open the second account.
>
> (emphasis provided)

PW1 admitted however that when his bank agreed to the No. 2 account the bank did ask for another additional securities. But I think that is not the crux of the issue here.

Certain other vital documents speak for themselves. In a letter (at p. 208) the 2nd appellant as Managing Director of the company wrote to the solicitors of the bank about the negotiations between him and PW1. Part of the letter reads:

> In the meantime we have discussed this matter with Mr. G. Daniel, Manager of the Bank and have informed him that we are presently preoccupied in restructuring our present equity holding due to some parties buying in and others selling out and also we are making arrangements with another financial institution to take over the entire financing of our company's operations and **have requested the Bank to give us up to the end of April to discharge our financial commitment.**
>
> (emphasis provided)

This letter was dated 15 March 1977. However on 18 March 1977 the solicitors of the bank wrote to the company requesting for settlement of the outstanding amount and the relevant part of the letter reads as follows.

> However, our clients have already agreed to allow you till 15 April 1977, to arrange for a full settlement of the outstanding amounts due,and we trust you would be able to do so within the stipulated time.
>
> We would reiterate that your failure to do so would leave our clients with little alternative, but to take legal proceedings as may be advised.

On 4 May 1977 the 5th appellant as Chairman of the company wrote to the bank informing the bank among other things of the new Board of Directors and the resignation of the 6th appellant. The concluding paragraphs of the letter read as follows:

> The newly appointed Directors together with Osman bin Abdul Ghani have acquired some 60% of the equity interest in the company. This makes it the first privately controlled Bumiputra tractor company in this country (leaving aside United Manufacturers that is wholly owned by Bank Rakyat). We should also like to add that we are one of the very few tractor companies permitted by the Malaysian Government to import used tractors for reconditioning and resale in this country.
>
> From the resumes of our Board members you can appreciate that the Executive Directors have had past experience in the tractors and heavy equipment industry in this country having previously worked in other tractor companies prior to taking up their appointments in this company. We are confident therefore that the company will continue to prosper with the contribution of their talents in the days ahead.

I might also point out that this letter ended with an optimistic note:

> We look forward to **continuing the business relationship between us** to our mutual benefit.

The next important document is the letter dated 20 June 1977 from the 5th appellant to the Bank recording the discussion between the company and the Regional Manager with positive proposals.

To my mind the background facts are clear enough. After demand for payment was made by the Bank on 21 February 1977 the company asked for time to pay and time was allowed but only up to 15 April 1977. We see clearly that no action was taken by the Bank even after 15 April 1977 and we also see evidence of definite and positive communications between the Bank and the company and in particular the new arrangement suggested by the company which was subsequently expressed in letter dated 20 June 1977 from the 5th appellant to the Bank.

In my view it is implicit in all these communications that forbearance was requested for. The Second Guarantee was executed between 25 August 1977 and 22 September 1977 by the appellants. The company executed the second debenture on 15 October 1977. I do not think

it can be any clearer that the Bank responded to the new arrangement proposed by the company and that the new account was operational during the period 25 August 1977 and 22 September 1977 when the appellants signed the Second Guarantee.

The law is as stated by Lopez LJ in *Crears v. Hunter* [1887] 19 QBD 341:

> The law appears to be that a promise to forbear is a good consideration, but also that actual forbearance at the request, express or implied, of the defendant would be a good consideration.

Azmi CJ (Malaya) (as he then was) in a separate judgment in *Yang Chin Lang v. Tan Chong & Sons Motor Co. Ltd* (*supra*) followed *Oriental Bank of Malaya Ltd. v. Subramaniam* [1958] MLJ 35 that in a matter such as this the Court may consider the circumstances of the whole case in interpreting the intention of the parties.

In *Oriental Bank of Malaya Ltd.* (*supra*) the guarantee was signed on 14 July 1954 by two brothers one of whom was having an overdraft account with the Oriental Bank amounting to RM28,887. The trial Judge in the High Court had held that the other brother was liable only to the amount of overdraft drawn **after** 14 July 1954 which amounted to only RM379. Thomson CJ (Malaya) in the Court of Appeal asked the following question first before dealing with the facts of the case:

> What were the facts relevant to the agreement between the parties as they existed on 14 July 1954?

He then said - "in the circumstances the conclusion would be unavoidable" that the overdraft mentioned in the letter of guarantee was the overdraft **in existence** on 14 July 1954 and continuing and not only the amount accruing **after** 14 July 1954.

It is "a mere question of evidence" said Lord Esher MR in *Crears v. Hunter* (*supra*). His Lordship dealt with the question at p. 345:

> The question is therefore whether there was sufficient evidence in this case to entitle the jury to infer that the understanding between the plaintiff and defendant was that, if the plaintiff would give time to the father, the defendant would make himself responsible.

In *Fullerton & Anor. v. Provincial Bank of Ireland* [1903] AC 309 the House of Lords had to construe some business letters in which the words "all you require is a little patience" appeared in one of the letters to Mr. Stuart, manager of the Bank. In construing these business letters Lord Macnaghten said that it was not necessary that there should be an arrangement for forbearance for any definite or particular time. It will be quite enough if the Court can infer from the surrounding circumstances that there was an implied request for forbearance and that forbearance for a reasonable time was in fact granted. In *Fullerton* Lord Shand dealt with the second question there which was consideration. He said:

> As I gather from the letters there was pressure for the repayment of that debt. In answer to that pressure those letters were written which led to the forbearance of the bank, and I am of opinion that that is sufficient to meet the argument on the second point.

Let me summarise the evidence available against the appellants. The request for forbearance was clearly expressed in the letters to the Bank written by the 2nd and 5th appellants referred to earlier. Other than the 2nd and 5th appellants the other signatories to the No. 2 Account were the 3rd and 4th appellants. The signatories of the No. 2 Account must surely know that the new account was part of the solution to grant the company time to pay off the existing liabilities of the company. The 1st, 2nd and 6th appellants executed the first guarantee referred to earlier which was in relation to the existing liabilities and in respect of which action was withheld by the Bank.

The lawyer who prepared the documentation, Mr. Chandran (PW3) told the Court that he met some of the Directors of the company on 29 July 1977 and left the guarantee documents with the 5th appellant. When he returned on 15 October 1977 the document had already been signed. PW3 said that when he met the Directors of the company they knew he was acting for the Bank and in fact PW1 was also with him at that time. PW3 said that no specific question was asked relating to the guarantee document and as far as he could remember none of the appellants indicated that they wanted to seek their solicitors' advice.

All the appellants are businessmen. The 5th appellant's letter dated 4 May 1977 referred to earlier was generous in its praise of the experience of the executive directors. Where the real consideration is forbearance to sue this consideration more often than not has to be implied from the nature of the transaction as between businessmen. As Bowen LJ said in *Miles v. New Zealand Alford Estate Co.* [1886] 32 Ch D 266:

> We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between businessmen.

As regards the 6th appellant I do not think that the fact he was no longer on the board when he executed the second guarantee could absolve him from liability. His resignation at the eleventh hour to escape the heat should not make him any less vulnerable than the other appellants.

Finally I might add that all the appellants chose not to give evidence after the close of the plaintiffs' case to throw some light on their defence.

On the evidence available the trial Judge was in my opinion perfectly entitled to make the inference as he did that there was a request for forbearance and there was forbearance in fact.

I would accordingly dismiss the appeal with costs.

Lee Hun Hoe CJ (Borneo):

I have the advantage of reading the judgments of my two learned brethren. I find myself in agreement with the judgment of Hashim Yeop Sani SCJ Nothing would be gained if I were to repeat their views in words of my own. The facts have already been set out by Seah SCJ

Before us there is only one ground of appeal, that is, the learned Judge erred in law and in fact in holding that there was valid consideration for the guarantee dated 25 August 1977 given by the appellants. We are concerned with the second guarantee which involved the six appellants who were directors of Quality Tractors (M) Sdn. Bhd. (referred to as the company). The six appellants are men of business who should know what they are doing in business affairs. Their common defence was that there was no consideration. They contended that the second guarantee was not a forbearance but an attempt to increase the amount of the collateral security held by the respondent bank.

The respondent bank was on the verge of suing the company but was willing to forbear suing the company when the appellants gave the second guarantee. Clearly, the second guarantee was given for the benefit of the company by giving the company time to arrange for the payment of the debt. It is the duty of the directors and equally those who purport to act as directors, to look after the affairs of their company, to see that it acts within its powers and that its transactions are regular and orderly. It is immaterial how long a person has been a director, as it is whether he is an idle or diligent director or a robust or sick director.

In *Miles v. New Zealand Alford Estate company* [1886] 32 Ch D Bowen LJ made the following observations at p. 291:

> ... So it will be sufficient here that the directors did forbear, if their forbearance was at the request expressed or implied of the guarantor and in consequence of his guarantee being given, and it seems to me there is no sort of necessity to discover language of any particular form, or writing of any particular character, embodying the resolution of the directors. We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between business men ...

These observations apply aptly to the case under appeal. In my opinion no resolution of the directors is necessary to bind them to the guarantee under the circumstances. As Lord Esher MR remarked in *Crears v. Hunter* [1887] 19 QBD 341 that it was " a mere question of evidence".

The authorities are clear that forbearance could either be expressed or implied. With respect, the learned Judge is entitled to hold that the forbearance could be inferred from the surrounding circumstances. He also held that there was consideration for the second guarantee. On the evidence I do not think he was wrong to come to the conclusion which he did. I agree with what he said in his judgment that:

> ... It was also stated in the case of *Lloyd v. Harper* [1880] 16 Chancery Division 290 which authority was accepted in the cases of *Oriental Bank v. Subramaniam* [1958] MLJ p. 35 and *Yang Chin Lang v. Tan Ching* [1968] MLJ p. 8 that any guarantee be interpreted reasonably after taking the surrounding circumstances into consideration.

Reference was made by Hashim Yeop Sani SCJ to the negotiation in the form of exchange of letters. I share his view that it is implicit in all these circumstances that forbearance was requested for. The opening of a new account indicated that the bank had accepted the new arrangement proposed by the company. The appellants gave the second guarantee willingly and knew that it was for the benefit of the company. The consideration is the forbearance to sue. This may be implied from the nature of the transaction as between businessmen. In the light of the evidence I cannot say that the learned Judge was wrong in making the inference from the surrounding circumstances.

I am therefore compelled to hold that the appeal should be dismissed with costs and the deposit be paid to the respondents on account of taxed costs.

George Seah SCJ:

The respondent, United Asian Bank Berhad sued the 1st, 2nd, 3rd, 4th, 5th and 6th guarantors (hereinafter called the 1st, 2nd, 3rd, 4th, 5th and 6th appellants) in the High Court at Kuala Lumpur upon two written guarantees. The 1st guarantee of RM430,000 was signed only by the 1st, 2nd and 6th guarantors on 14 October 1975 and the 2nd guarantee of RM1,000,000 was executed by all the six appellants on diverse dates between 25 August 1977 and 22 September 1977 respectively. These two guarantees are hereinafter referred to as the 1st guarantee and 2nd guarantee. At the hearing in the High Court the respondent withdrew their claim based on the 1st guarantee without prejudice to pursue it at a later date if necessary, and proceeded only against all the six appellants on the 2nd guarantee. The learned Judge gave judgment in favour of the respondent and this is an appeal against his decision.

a It is common ground that the respondent are a licensed bank and having a branch office at Jalan Melaka, Kuala Lumpur and a company trading under the name of Quality Tractors (M) Sendirian Berhad (hereinafter referred to as Quality Tractors) are at all material times a customer of the respondent. Since the 1st guarantee was in some way related to the 2nd guarantee I would like to set out briefly how both the guarantees came to be signed.

b It is not in dispute that after opening an account, Quality Tractors applied for and were granted credit facilities by the respondent on 14 October 1975 on the following terms and conditions:

(1) Foreign Documentary Letter of Credit on sight and/or 90 days D/P terms ... RM500,000

With

c

Shipping Guarantee/Trust Receipt on 120 days terms (available for collection bills also) ... RM350,000

(2) Cash Credit subject to account being healthily operated ... RM 80,000

d

(3) Letter of Guarantee favouring Government Departments ... RM 25,000

(4) Inland Cheques purchased ... RM 25,000

Subject To:

e

(a) Monthly statement of stock as per our standard form enclosed.

(b) Monthly statement of Current Assets & Liabilities as per our standard form enclosed.

f *Security:*

(1) Personal guarantees of the Directors of company for RM430,000 in our standard form 111.

g

(2) Registered Debenture for RM430,000 creating a floating charge on the assets of the company.

(3) Hypothecation of stock in our standard form 110A and

(4) Assignment of book debts.

h Quality Tractors executed the Debenture on 14 November 1975 (hereinafter called the 1st debenture) and the 1st, 2nd and 6th appellants signed the personal guarantee as Directors of the company. That was how the 1st guarantee came into existence. Since the respondent did not now base their case on the 1st guarantee no more need be said about it.

i I will now attempt to set out the relevant facts surrounding the execution of the 2nd Debenture for RM570,000 and the 2nd guarantee for the sum of RM1,000,000 each.

After the account had been in operation for sometime it appeared that some kind if misunderstanding had arisen between Quality Tractors and the respondent with regard to the exact sum allowed under the revolving L/C and 120 days T/R facilities. The matter was referred to the Branch Manager of the Bank on 11 February 1976. It was the contention of Quality Tractors that these banking facilities ought to be treated separately and urged the respondent to reconsider this request. The Branch Manager of the bank replied on 11 May 1976 that the matter had been referred to Head Office. It seems that the application for further banking facilities by Quality Tractors was turned down by the Bank inasmuch as on 21 February 1977 the solicitors for the Bank sent a letter to Quality Tractors demanding payment of the total sum of RM1,021,994.50 made up of the undermentioned items.

Overdue Trust Receipt and Interest:

(i) Amount ... RM637,913.25

(ii) Interest ... RM 41,256.04

LCUBR

Amount ... RM191,124.23

Cash Credit Overdraft:

Amount ... RM 90,702.98

Government guarantees:

Amount ... RM 60,998.00

On receipt of this letter of demand Quality Tractors asked for time till the end of April 1977 to discharge the debts due but the respondent only allowed them until 15 April 1977. After 15 April had expired the respondent did not appear to have taken any legal action against Quality Tractors. Instead on 4 May 1977 the Chairman of Quality Tractors reported to the respondent about changes in the Board of Directors and the resignation of the 6th appellant, Mathew K. Mathai. At the same time the Chairman asked for permission to operate the overdrawn current overdraft account on a "fluctuating" basis and also suggested certain dates for the settlement of all outstanding L/C and T/R bills. Before the first overdue T/R bill was to be paid on 31 May 1977 the Chairman of Quality Tractors on 27 May 1977 formally applied to the Bank for current overdraft limit to be increased from RM80,000 to RM1,050,000. This appeared to have been turned down by the respondent. There was no request to raise the ceiling of both the Letter of Credit and the Trust Receipts, but the Chairman did ask for a little more time to raise money to settle the debts. Following discussions with the Regional Manager and Branch Manager the Chairman of Quality Tractors addressed a letter to the respondent on 30 June 1977 in the following terms:

The Manager,
United Asian Bank Berhad,
Jalan Melaka,
Kuala Lumpur, 20 June 1977

Dear Sir,

Outstanding balances

We refer to the discussions we had with your Regional Manager and yourself on Tuesday 14th instant and would like to confirm the following:

(a) We would prefer to proceed under the second alternative as described in para. 2(ii) of our letter to you of 27 May.

(b) Subject to your agreement we will leave the current overdraft as it is for the time being and open another current account with you under the style of "Quality Tractors No. 2 a/c" for our future banking operations and you will not offset any credit balances on this account against the present overdrawn one without our prior approval. We will operate this new account on a credit basis and will not overdraw on it.

(c) The additional debentures etc. that you want us to execute can be prepared and executed in 3 weeks' time and that too they will be undated at the time of execution and will remain undated for a future 8 weeks on the understanding that if by the end of that time we do not come up with suitable banking arrangements to meet with (a) above i.e., the second alternative as described in para. 2(ii) of our letter of 27 May to you, then you may proceed to date the debenture as at that date.

Kindly confirm to us at the foot of this letter that you are agreeable to the above and we will follow accordingly.

Yours truly,

Sgd.

(Sharani Abdul Ghafar)
(Chairman)

Meanwhile, the record showed that Quality Tractors executed a second Debenture on 15 October 1977 to secure the sum of RM570,000 which together with the first Debenture of RM430,000 made a total of RM1,000,000. Similarly, personal guarantees were signed by:

1st appellant on 25 August 1977,

2nd appellant on 22 September 1977,

3rd appellant on 12 September 1977,

4th appellant on 12 September 1977,

5th appellant on 25 August 1977,

6th appellant on 25 August 1977,

for the sum of RM1,000,000 each. These guarantees which are known as the 2nd guarantee are the subject of this appeal.

There can be no doubt that the respondent approved the opening of this new account to be known as "Quality Tractors Account No. 2" in terms of para. (b) of the letter dated 20 June 1977 when they accepted the deposit of RM2,000 on 14 July 1977. According to a bank statement it seems that between 15 July 77 and 25 November 1977 Quality Tractors paid into this new account a total sum of RM114,994.35. However, by 31 December 1977 the balance was drastically reduced to RM1.46. On 20 October 1977 Quality Tractors undertook to make progressive payments to the respondent towards a reduction of the debts due. When Quality Tractors failed to make good this promise the Branch Manager requested for permission to transfer the entire credit balance in Account No. 2 in order to reduce the overdue T/R bills on 16 December 1977. A reminder was sent on 22 December 1977 and para. 2 reads:

As you are silent in this matter we shall take it that we have your authority to transfer the funds available in your Current Account with us to reduce the outstanding under Overdue Trust Receipt Bills.

Although there was no record of any transfer but it was reasonable to infer that the very substantial reduction of the credit balance on 31 December 1977 was probably due to the step taken by the respondent.

When Quality Tractors failed to settle the outstanding debts legal action was taken by the respondent against all the 6 appellants as guarantors of the 2nd guarantee.

At the time of the execution of the 2nd guarantee with the exception of the 6th appellant all the other appellants were directors of Quality Tractors (M) Sdn. Bhd. The 6th appellant was originally a director of the company but he resigned as a director in March 1977.

In their common defence all the appellants admitted signing the 2nd guarantee but denied that it was for the consideration stated in para. 4 of the amended statement of claim and put the respondent to strict proof thereof. At the time when the 2nd guarantee was executed it was submitted that the total amount of the indebtedness was already in excess of one million dollars and the respondent did not promise or undertake to make any future advances or credit to Quality Tractors. It was argued that the real purpose of the 2nd guarantee was not forbearance as alleged but was an attempt to increase the amount of the collateral security held by the respondent.

For the respondent learned Counsel contended that the 2nd guarantee was signed in consideration of the respondent (1) withholding legal proceedings against Quality Tractors on the 1st Debenture and the 1st guarantee against the 1st, 2nd and 6th appellants; (2) continuing the existing banking facilities in favour of Quality Tractors; (3)increasing the limits of the existing banking facilities to Quality Tractors and (4) continuing the existing bank account and overdrafts of Quality Tractors. At the hearing of the appeal learned Counsel abandoned para. (2), (3) and (4) and relied solely on ground (1). Needless to say, the onus of proving this rested on the respondent and the first task I have to ascertain was whether the respondent had discharged this burden before the learned trial Judge in the Court below.

Learned Counsel for the respondent submitted that forbearance could either be express or implied and he invited the learned Judge to infer forbearance from the surrounding circumstances. The learned Judge held that forbearance could be so inferred and the inference made by the learned Judge is now the subject of an attack in this appeal.

This appeal was not concerned with the construction of the terms of the 2nd guarantee signed by all the six appellants; it was concerned with the submission of learned Counsel for the said appellants that there was no consideration to support the said guarantee. I have therefore to determine whether or not there was any consideration for the 2nd guarantee.

In my opinion, the following propositions may be gathered from the decided cases.

Firstly, it is now well-settled that a pre-existing debt is not a good consideration for a guarantee. In *Wigan v. English & Scottish Law Life Assurance Association* [1909] 1 Ch D 291 Parker J said:

> It appears to me to be reasonably clear that the mere existence of a debt from A to B is not sufficient valuable consideration for the giving of a security from A to B to secure that debt.

Vaughan Williams LJ observed that "I may say that I entirely agree with the proposition" in *Glegg v. Bromley* [1912] 3 KB 474 @ 479.

Secondly, where in a guarantee no stipulation for future advances is made, the consideration must be supplied by forbearance to sue for the existing debt at the request of the guarantor. The request may either be express or implied. In *Crears v. Hunter* [1887] 19 QBD 341 @ 345 Lord Esher MR said:

> It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request ...

In *Miles v. New Zealand Alford Estate Co.* [1886] 32 Ch D 266 Bowen LJ said:

> So it will be sufficient here that the directors did forbear, if their forbearance was at the request expressed or implied of the guarantor and in consequence of his guarantee being given ...

After stating that the mere existence of an antecedent debt is not valuable consideration for a security given by the debtor, Parker J continued at pp. 297-298 in the case of *Wigan v. English & Scottish Law Life Assurance Association* (*supra*):

> If such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time. It may not be a definite time, but to forbear for some indefinite time in consideration of the security being given ...

The judgment of Parker J was to a large extent founded upon *Alliance Bank v. Brown* [1864] 62 ER 631 where Kindersley V-C said at p. 632:

> It appears to me that, when the plaintiffs demanded payment of their debt, and, in consequence of that application the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did in effect give, and the defendant received, the benefit of some degree of forbearance; not indeed, for any definite time, but, at all events, some extent of forbearance.

This passage of Kindersley V-C was cited by Bowen LJ in *Miles V. New Zealand Alford Estate Co.* (*supra*).

The case of *Alliance Bank v. Brown* (*supra*) was affirmed in very definite language by the House of Lords in *Fullerton v. Provincial Bank of Ireland* [1903] AC 309. In that case Lord Macnaghten said at p. 313:

> My Lords, this point seems to me to be settled by authority. In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time, it is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearnace for a time, and that forbearance for the reasonable time was in fact extended to the person who asked for it. That proposition seems to me to be established by the case of *Alliance v. Brown* (*supra*), to which my noble and learned friend Lord Lindley referred yesterday, and other cases, among which I may mention *Oldershaw v. King* [1857] 157 ER 213, with the observations on that case and on the case of *Alliance Bank v. Brown* by Bowen LJ in *Miles v. New Zealand Alford Estate Co.* [1886] 32 Ch D 266 and I may add that the proposition seems to be good sense.

How is this problem to be solved by the Courts? In *Heffield v. Meadows* [1869] LR 4 CP 595 Willes J said at p. 599:

> It is obvious that we cannot decide that question upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee. Having done that, it will be proper to turn to the language of the guarantee, to see if the language is capable of being construed so as to carry into effect that which appears to have been the real intention of both parties.

In *Lloyds v. Harper* [1880] Ch D 290 Fry LJ said words to the same effect that a guarantee must be construed not only by the words used but also with regard to the surrounding circumstances.

In *Miles case* Bowen LJ said at p. 219:

> We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between business men.

This passage was cited with approval by Lord Davey in *Fullerton* case at p. 316.

I come now to deal with the evidence adduced at the trial.

It seems to me that the 2nd guarantee had to be construed in the general setting of negotiations between the Chairman, 5th appellant and Managing Director, 2nd appellant of Quality Tractors on the one side and the Regional Manager, Mr. Narayansamy and the Deputy Manager, Mr. Liew of the respondent bank on the other side. It was alleged that Mr. Narayansamy had since returned to India but there was no mention about the whereabout of Mr. Liew. In the absence of any evidence to the contrary, I would assume for the purpose of this appeal that both are still alive and probably available. Both of these gentlemen had personal knowledge of the matter and would be the natural persons to come forward on behalf of the respondent and give full account of what had transpired. The respondent appeared to have kept them away from the Court and their absence had not been properly explained. Instead the respondent tendered a witness called George Daniels (PW1) who was the Division Manager at the relevant time. But the witness candidly admitted that during the months of May and June 1977 when discussions were being conducted between the parties concerned, he was away in the United Kingdom. As for as he was concerned the 2nd guarantee were executed on the suggestion of the Regional Manager, Mr. Narayansamy. When questioned about the real purpose of the 2nd debenture and the 2nd guarantee, PW1 said:

> I agree that this second debenture and the guarantee in 1977 were asked when I realised that the limit had been exceeded beyond the secured position in 1975. And because of that I made every attempt to get the company and the directors to execute the debenture and guarantee. For that reason too my solicitor (PW3) and I went to the company's office to make sure that the debenture and guarantee were executed.

It was pertinent to note that at the time of the execution of the 2nd guarantee by the appellants the bank accounts of Quality Tractors had been dormant for several months, and that the respondent did not advance and had no intention at the time of making any further advances to Quality Tractors.

There was also a letter in the Agreed Bundle of Documents written by Quality Tractors to the respondent dated 20 June 1977 which seemed to support the uncontroverted oral testimony of PW1 that it was the respondent who demanded the execution of the 2nd debenture and the 2nd guarantee to make up the insufficient security by the respondent.

Now, the law on inference is clear: where no question arises as to truthfulness and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of an appellate Court - per Lord Halsbury L.C. in *Montgomerie & Co. Ltd. v. Wallace-James* [1904] AC 73 @ 75 and cited by Viscount Simonds in *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370 @ 372. At p. 376 Lord Reid said:

> But in cases where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal Court is generally in as good a position to evaluate the evidence as the trial Judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion. In *Rickmann v. Thierry* [1896] 14 RPC 105 at 116 Lord Halsbury said: The hearing upon appeal is a rehearing, and I do not think there is any presumption that the judgment in the Court below is right.

See also s. 69(4) of the Courts of Judicature Act 1964.

Approaching the matter in this way, I find that the respondent had failed, in my opinion, to adduce any evidence to establish that it was the appellants who had requested for forbearance to sue. In my judgment, all the oral and documentary evidence produced at the trial pointed only to one direction, viz. that it was Quality Tractors, acting through its Chairman and Managing Director who asked the respondent for time and forbearance. They even put forward several proposals to the respondent in an attempt to settle the debts owing by Quality Tractors to the respondent. In my judgment, there was not one iota of evidence to show that the appellants as directors ever requested, directly or indirectly, for time and forbearance from the respondent. True, the appellants signed the second guarantee but they did so at the request, express or implied, of the respondent. In my opinion, the learned Judge drew an inference from the surrounding circumstances which was inconsistent with the proved facts, and in my judgment, ought to be reversed.

I would also like to consider the case of the 6th appellant separately. He stands on a different footing from the other appellants in that he was not a director of Quality Tractors when he signed the 2nd guarantee. It appeared that he had resigned as director with effect from 18 March 1977. As he was no longer a director there was absolutely no evidence, express or by necessary implication, whereby it could be implied that he requested the respondent to forbear from suing on the existing debt. There was therefore no effective consideration to support the 2nd guarantee and the result was that the claim against him also failed.

There was one other matter I like to mention. The learned Judge alluded to the fact that all the appellants failed to give evidence in the witness-box. In my opinion, no adverse inference should be drawn against them for taking this course since the onus of proving the case against all the six appellants rested on the respondent. Until the respondent had established a *prima facie* case against them there was no reason why the appellants should go to the witness box, give evidence and be subject to cross-examination by learned Counsel for the respondent when the evidence adduced by the respondent pointed only one way, viz. that it was the respondent who insisted on the signing of the 2nd guarantee to make up for the inadequate security held by them for a bad debt.

For the above reasons, I would allow the appeal and set aside the judgment of the High Court with costs to be taxed. The deposit to be refunded to the appellants.

Also found at [1987] 1 CLJ 139